Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

UNITED STATES OF AMERICA,
*RESPONDENT,*

v.

PAUL WAYNE DERRICK, LARRY BLANDING and
JEFFERSON MARION LONG JR.,
*PETITIONERS.*

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

# *PETITION FOR WRIT OF CERTIORARI*

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## QUESTIONS PRESENTED FOR REVIEW

I. Whether the District Court's findings that government agents engaged in repetitious and egregious misconduct by failing to disclose exculpatory and material evidence to the criminal defendants and allowing perjured testimony to be submitted to the Court were properly found to be clearly erroneous by the Court of Appeals.

II. Whether, in light of the pattern and nature of the prosecutorial misconduct found by the District Court, it was within the District Court's power to dismiss the indictments charging the Petitioners with violations of the Hobbs Act in connection with their service as members of the South Carolina General Assembly.

## LIST OF PARTIES TO PROCEEDINGS BELOW

Pursuant to Sup. Ct. R. 14(b), the Petitioners submit the following list of parties to the proceedings before the United States Court of Appeals for the Fourth Circuit.

The Petitioners are Paul Wayne Derrick, Larry Blanding, and Jefferson Marion Long Jr., a/k/a "Bud," who were Appellees-Defendants in the Court of Appeals. In addition, the Court of Appeals allowed the following to participate as amicus curiae on the side of the Appellees:

- Alva Taylor Brown, Personal Representative of the Estate of Luther Langford Taylor;
- The Estate of Benjamin J. Gordon, a/k/a "B.J.";
- The National Association of Criminal Defense Lawyers.

The Respondent, who was the Appellant-Plaintiff below, is the government of the United States of America. In addition, the Court below allowed the following persons to participate as amicus curiae on the side of the Appellant:

- Dale L. DuTremble;
- E. Bart Daniel;
- Richard Greer.

There are no parent companies or nonwholly owned subsidiaries involved in this case.

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## OPINIONS BELOW

The opinion and order of the United States District Court for the District of South Carolina dismissing the indictments is reported in *United States v. Taylor*, 956 F. Supp. 622 (D.S.C. 1997), and is set forth in the Appendix beginning at A-87.

The opinion and order of the United States Court of Appeals for the Fourth Circuit vacating the order of the District Court is reported in *United States v. Derrick*, 163 F.3d 799 (4th Cir. 1998), and is set forth in the Appendix beginning at A-1. The order of the Court of Appeals denying the Petitioners' motion for rehearing and, by a vote of 6 to 5, suggestion for rehearing en banc is set forth in the Appendix at A-184, -185, -186. The order of the Court of Appeals denying the Petitioners' motion to stay the mandate is set forth in the Appendix at A-187, -188, -189.

## STATEMENT OF JURISDICTION

The order and judgment of the United States Court of Appeals for the Fourth Circuit vacating the District Court's judgment was entered on November 23, 1998. (A-2.) The Petitioners timely filed a petition for rehearing and suggestion for rehearing en banc on December 7, 1998. The Court of Appeals' order denying rehearing and suggestion for rehearing en banc was filed on January 25, 1999. (A-184.)

This Court has jurisdiction to review the orders and judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public

danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATEMENT OF THE CASE

These criminal cases resulted from a federal undercover sting operation which targeted the South Carolina General Assembly. A federal grand jury in South Carolina returned two-count indictments on February 20, 1991 and August 20, 1991, charging Petitioners Paul Wayne Derrick and Jefferson Marion ("Bud") Long Jr., respectively, with violations of the Hobbs Act, 18 U.S.C. § 1951. (A-91, -92.) Petitioner Larry Blanding was charged with Hobbs Act violations in a six-count indictment returned on September 21, 1990. (A-91.) The United States District Court for the District of South Carolina had jurisdiction over these criminal actions under 18 U.S.C. § 3231.

The sting, code-named "OPERATION LOST TRUST," began after the arrest of lobbyist Ronald L. Cobb on drug charges; Cobb offered to help the FBI make corruption charges against South Carolina legislators in return for transactional immunity. (A-89.) OPERATION LOST TRUST eventually involved the investigation of numerous state legislators and lobbyists and the return of federal indictments against several members of the South Carolina state legislature, including the Petitioners Derrick, Blanding, and Long. (A-91, -92.)

Each Petitioner was tried separately from the others in the District Court and convicted. Derrick's and Blanding's convictions were reversed and their cases remanded for new trials in separate appeals to the Court of Appeals for the Fourth Circuit because of improper jury instructions. *United States v. Derrick*, No. 92-5084 (4th Cir. Feb. 7, 1994), and *United States v. Blanding*, No. 91-5871 (4th Cir. June 22, 1992) (citing *United States v. Taylor*, 966 F.2d 830 (4th Cir. 1992), *aff'd on reh'g*, 993 F.2d 382 (4th Cir.), *cert. denied*,

510 U.S. 891 (1993)). Petitioner Long's motion for a new trial was granted by the District Court because evidence had been improperly submitted to the jury, and this ruling was affirmed on appeal. *United States v. Long*, No. 92-6799 (4th Cir. Feb. 25, 1994). (A-92.)

Prior to any retrial, the Petitioners joined in motions made in the related OPERATION LOST TRUST cases to dismiss the indictments because of prosecutorial, agency, and/or investigative misconduct. (A-93, -94.) The District Court heard extensive testimony, reviewed volumes of documents, and received oral and written arguments in connection with the motions to dismiss. (A-97.) On February 28, 1997, the District Court issued an 86-page opinion and order granting the motions of the Petitioners and the other defendants to dismiss the indictments, finding extensive prosecutorial misconduct amounting to "fraud upon the court." (A-176.)

The prosecutorial misconduct found by the District Court was pervasive, and its full scope was discovered only when the government produced volumes of discovery material that had not been produced in the earlier trials, as well as transcripts of grand jury proceedings and hearings which had been closed at the request of the government. (A-93.) The disclosure of this new discovery material prompted an investigation by the Department of Justice's Office of Professional Responsibility and the eventual recusal of the entire office of the United States Attorney for the District of South Carolina. (A-93.) The newly disclosed evidence also prompted the District Court to order that the government disclose to the defendants all of the materials in the government's possession concerning these cases which had not been made available to the defendants previously. (A-95, -96.)

After hearing testimony and the arguments of all sides over a three-year period, the District Court made extensive findings of misconduct including, but not limited to, the following:

- The government knowingly withheld written interview records (FD-302s) and audio and video tapes which would have impeached Cobb's testimony, the government's primary evidence inculpating Petitioners, that Cobb considered any

money he gave to the defendants to be illegal bribes to influence their actions as legislators, as opposed to legal campaign contributions (A-110, -114, -115, -118);

- An FBI agent falsely denied the existence of any notes of an interview of Cobb, which notes were eventually disclosed to the defendants pursuant to a District Court order after the Court of Appeals ordered a new trial (A-127, -128, 129, 180);

- The government prosecutors allowed Cobb's perjurious testimony that he had not given bribes to other legislators to stand uncorrected (A-128, -180);

- On several occasions, the United States attorneys handling these series of related prosecutions made false representations that all exculpatory and impeaching discovery material to which the defendants were entitled had been turned over to the defendants (A-131, -132, -174, -177, -178); and

- United States attorneys allowed false testimony to be presented to the grand jury investigating this matter (A-137, -138, -180, -181).

As summarized by the District Court, "the misconduct here is repetitious, flagrant and longstanding." (A-175.) Based upon these findings, the District Court ruled that the only remedy available to the defendants commensurate with the misconduct was dismissal of the indictments with prejudice and entered an order accordingly. (A-89.)

The United States appealed that order, as it applied to the several cases, to the Court of Appeals, which vacated the District Court's order and remanded the cases for retrial. Citing *United States v. Hasting*, 461 U.S. 499 (1983), the Court of Appeals first held that because a court may not, without finding prejudice to the defendant, exercise its supervisory power to reverse a defendant's conviction because of prosecutorial misconduct, "a court may not dismiss an indictment altogether on this ground without also finding

prejudice." (A-14.) It ruled that none of the cases cited by the District Court "can overcome the force of the controlling Supreme Court authority requiring the district court to find prejudice to the defendants before dismissing indictments based upon prosecutorial misconduct." (A-19.) The Court of Appeals then stated that "any prejudice that arguably existed as a consequence of discovery violations is fully remedied by this court's order of new trials." (A-19.)

The Court of Appeals also rejected the contention that the District Court's order of dismissal could be upheld because the evidence showed a pattern of prosecutorial misconduct. Although recognizing that the decisions in *Bank of Nova Scotia v. United States*, 487 U.S. 250, 259 (1988), and *United States v. Morrison*, 449 U.S. 361, 365 n.2 (1981), alluded to the possibility that a pattern of misconduct could warrant dismissal of an indictment, the Court of Appeals ruled that even if dismissal was an available remedy when a pattern of misconduct is shown, "we doubt that the [Supreme] Court would apply it where, as here, alternative sanctions—including publicly chastising the attorneys and recommending them for disciplinary proceedings—were available to the court and were not employed prior to dismissal of the indictments." (A-21.)

Notwithstanding this ruling, the Court of Appeals went on to address the sufficiency of the evidence supporting the District Court's findings of prosecutorial misconduct and found each and every one of those findings to be contrary to the record. The Court of Appeals premised its decision to overturn every finding by stating that the District Court relied "upon only defense claims of intentional wrongdoing, rather than upon an independent analysis of the record evidence" (A-22), and made the following specific rulings concerning the findings below:

- Evidence showing that Cobb arbitrarily characterized monies paid to legislators as bribes or campaign contributions was not exculpatory or material, and so nondisclosure of the evidence did not violate the Petitioners' constitutional rights (A-40, -41, -42);

- The Court of Appeals reversed the finding that Cobb committed perjury in testifying that monies given to some legislators were not bribes, and that the government knowingly allowed this perjury to stand, on the basis that Cobb could have subjectively believed his payments were not bribes (A-70, -71);

- The Court of Appeals reversed a finding that Cobb and Special Agent Clemens committed perjury by misrepresenting the purpose for their late-night visit to a legislator's confidante, even though the District Court had relied upon conflicting statements made in testimony before it and the circumstances of the visit, deeming the evidence insufficient to support this finding (A-56, -57, -58); and

- A finding that the government knowingly had allowed perjury before the grand jury by Richard Greer, former Chairman of the South Carolina Development Board, which was based upon conflicting assertions made by the government to the District Court at different times, was overturned by the Court of Appeals (A-67, -68, -69).

The Court of Appeals also relied upon what it considered to be conflicting findings made by the District Court. (A-74, -75, -76.) The asserted conflict was between findings made five years before the motions to dismiss were granted and before additional discovery by the defendants had occurred and the ultimate findings made by the District Court. The Court of Appeals concluded that the findings of prosecutorial misconduct "are simply unsupported by the record before the court." (A-85.)

The Petitioners timely filed a petition for rehearing and suggestion for rehearing en banc. (A-186.) Five of the eleven members of the Court of Appeals qualified to vote on the suggestion voted that the case should be reheard en banc. (A-186.)

## ARGUMENT

### I. THE COURT OF APPEALS ERRED IN RULING THAT EACH OF THE DISTRICT COURT'S FINDINGS OF GOVERNMENT MISCONDUCT WERE NOT SUPPORTED BY THE EVIDENCE.

The standard of review appellate courts are to apply to factual findings made by district courts is set forth in *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985)), as follows:

> It is well settled, however, that a federal appellate court may set aside a trial court's findings of fact only if they are "clearly erroneous," and that it must give "due regard . . . to the opportunity of the trial court to judge the credibility of the witnesses." . . . We have stressed that the clearly-erroneous standard of review is a deferential one, explaining that "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."

The "clearly erroneous" standard of review is fully applicable to factual findings made by district courts on preliminary matters in criminal actions. *Maine v. Taylor*, 477 U.S. 131, 145 (1986); *Campbell v. United States*, 373 U.S. 487, 493 (1963).

The deference required under the clearly erroneous standard is not merely a matter of blind respect toward the district court, but is based upon important distinctions between the roles of the district courts and appellate courts:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of

> credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' . . . rather than a 'tryout on the road.'" *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). For these reasons, review of factual findings under the clearly-erroneous standard—with its deference to the trier of fact—is the rule not the exception.

*Anderson*, 470 U.S. at 574-75. Judicial efficiency, trial judge expertise, and the importance of first-hand observation combine to require the deference to district court factfinding embodied in the clearly erroneous standard of review. *Maine*, 477 U.S. at 145.

That the Court of Appeals failed to apply the clearly erroneous standard of review in the instant case is evidenced by its reversal of *each and every* factual finding made by the District Court. Indeed, the Court of Appeals did not even honor this standard of review in words, failing even once to mention the standard of review applicable to the District Court's factual findings. The Court of Appeals gave no deference to the superior position of District Court Judge Hawkins, who had presided over all eight trials and various proceedings involving OPERATION LOST TRUST spanning seven years. Instead, the Court of Appeals scoured the record for any basis upon which it could seize to absolve the prosecutors and government agents of the systematic misconduct found by the District Court.

The Court of Appeals' decision to reverse the findings made by the District Court was certainly error because those findings were supported by the voluminous evidence before the District Court. This Court stands in the same position as the Court of Appeals in determining whether the findings were "clearly erroneous." *McAllister v. United States*, 348 U.S. 19, 20-21 (1954). The following examples demonstrate the Court of Appeals' failure to follow the controlling standard of review:

1. ***Evidence of Perjury***: District Judge Hawkins found that Ronald Cobb, the lobbyist whose arrest and offer to provide information triggered OPERATION LOST TRUST and who whose credibility was absolutely crucial to the government's case against the LOST TRUST defendants, committed perjury when he denied during testimony that he never gave illegal money to other legislators, and Judge Hawkins further found that the government was aware of this perjury but allowed it to stand. (A-180.) The District Court found perjury was committed because: (1) Cobb's FD-302s and other government documents clearly referred to a particular exchange of money as a payoff, (2) Cobb consistently testified that monies given to Blanding, Derrick, Long, and other LOST TRUST defendants were bribes, yet Cobb referred to payments to other legislators as simply contributions for the purpose of maintaining favorable relations and not bribes for specific legislative action; and (3) in interviews not disclosed to the Petitioners, Cobb admitted that as a lobbyist he often had given campaign contributions and that he did not care what the recipients did with the money. In reversing this finding of perjury, the Court of Appeals speculated that Cobb could have *subjectively* believed his "payoffs" to other legislators were not bribes and so did not commit perjury. (A-70.)

This attempt by the appellate court to determine the "subjective" state of mind of a witness is precisely the kind of revisiting of facts on appeal which this Court's controlling precedent precludes. Indeed, when findings are based upon determinations involving credibility, even greater deference to a district court's findings are required. *Anderson*, 470 U.S. at 575. The District Court's finding that Cobb committed perjury was well supported by the evidence, including an affidavit by Special Agent Dick in which he indicated that these "payoffs" (as Cobb labeled them) constituted

illegal bribes and that this fact had been discussed with Cobb and other investigators. (A-129.) Special Agent Richards also testified that Cobb admitted to him that Cobb had paid $20,000 in illegal monies to the most prominent legislators. (A-129.) Although the Court of Appeals' decision recognized that this evidence was presented below (A-72), it simply chose to disregard it and made the kind of credibility determination which was exclusively the province of the District Court. *Amadeo*, 486 U.S. at 223.

The Court of Appeals also referred to a 1991 decision by Judge Hawkins denying a motion to dismiss based upon the same allegation of perjury as showing that the District Court made "inconsistent findings" and "abruptly reversed course" on this point in its 1997 decision. (A-75.) But this "abrupt reversal" occurred five years after the first decision and only after extensive additional discovery brought other evidence to light. (A-128, -129, -182.) The District Court's decision recognized that "[w]ithout the defendants' unrelenting pursuit of their motions, . . . much of what is now known may never have seen the light of day." (A-182.) Thus, the District Court did not make inconsistent findings in light of the evidence before it each time.

The District Court also found that Special Agent Clemens had committed perjury by testifying that he never prepared an FD-302 indicating that Cobb had made "payoffs" to State Senator John Lindsay, who had been excluded as a target of the sting operation. (A-127, -180.) This finding was based upon evidence that such an FD-302 prepared by Clemens was discovered by the defendants, the government's denial of its existence, and Clemens's explanation that he "forgot" it existed. The District Court found this explanation implausible in light of the prominence of Lindsay and others implicated by the FD-302 (A-131), and the fact that the underlying notes were taken by Clemens to his new home in Washington, D.C., when he was transferred. (A-127, -128.) Without supporting evidence, the panel concluded that the record "suggests" the "misstatements" by Clemens were the result of oversight, disorganization, and forgetfulness. (A-80, -81.) Again, it was the District Court's province to determine the credibility of Clemens's explanation. An appellate court should not substitute its judgment on credibility and findings of fact for those of a district court. *Id.*

2. ***Failure to Disclose Evidence***: The District Court found that "much of the government's misconduct actually stems from its failure to disclose evidence to the defendants" as required by *Brady v. Maryland*, 373 U.S. 83 (1963). (A-178.) Criticizing this finding, the Court of Appeals first referred to contradictions in the record as to whether the cases operated under an "open file policy" and concluded that the District Court's mistaken belief that an open file policy existed was the basis of much of the District Court's reasoning that the government had wrongfully withheld evidence. (A-29, -37.)

But the Court of Appeals' reference to an open file policy is a "red herring" because any such policy or lack thereof had no impact on the District Court's finding that the government withheld *Brady* material. The District Court's opinion merely referred to discussions about an open file policy; it did not rely upon the existence of an open file policy as the basis for finding that the government withheld *Brady* evidence. Indeed, the existence *vel non* of an open file policy does not affect the government's responsibility to disclose to defendants exculpatory evidence. Prosecutors have an independent duty to disclose evidence favorable to an accused even if a specific request for the evidence is not made by the accused. *See Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995) (the government's duty to disclose evidence is triggered by the potential impact of favorable evidence). Notwithstanding any open file policy, the government was required to disclose to the Petitioners favorable evidence. If, as apparently concluded by the Court of Appeals, there was no open file policy in effect (A-29), then the failure of the government to disclose the *Brady* material was even more egregious because this was not a case where the defendants could have discovered the material by searching through the open files.

The Court of Appeals' further decision that the undisclosed evidence was not material or exculpatory proceeds from an erroneous view of what evidence is within the disclosure mandate of *Brady* and *Giglio v. United States*, 405 U.S. 150 (1972). The District Court properly focused on the fact that much of the undisclosed material showed that Cobb considered some monies given to legislators to be "campaign contributions" and not bribes. (A-113, -114, -118, -180.) Such evidence was crucial to the Petitioners and other defendants because it impeached Cobb's

testimony characterizing money he gave to the Petitioners as bribes. One withheld statement quotes Cobb as responding when asked to differentiate between those to whom he gave bribes and those who got campaign contributions that "that is a hard question to answer." (A-111.) The Court of Appeals held that such evidence was not exculpatory or material because it did not establish that the payments made to the Petitioners were not illegal bribes and only related to other legislators. (A-41, -44.)

But the fact that the withheld evidence did not directly negate an element of the charges against the Petitioners does not mean that it was not within the disclosure obligation of *Brady* and *Giglio*. In *United States v. Bagley*, 473 U.S. 667, 676 (1985) (emphasis added), this Court held that "*[i]mpeachment evidence, . . . as well as exculpatory evidence*, falls within the *Brady* rule." *Bagley* held that evidence showing that key government witnesses had a financial interest in testifying against the defendant should have been disclosed to the defendant if its disclosure could have changed the result of the trial. The undisclosed evidence concerning Cobb at issue here would have impeached his testimony that the monies given to the Petitioners were bribes because it showed Cobb to be inconsistent in denominating monies given as "bribes" or legal campaign contributions. The Court of Appeals was simply wrong in asserting that because the undisclosed material did not prove contributions given to the Petitioners were not bribes that it was not subject to the disclosure obligation of *Brady* and *Giglio*.

The District Court's conclusion that the undisclosed evidence was material also should not have been reversed by the Court of Appeals. Evidence is "material" "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682. Evidence impeaching Cobb and his testimony concerning the purpose for which he gave monies to the Petitioners was obviously crucial to the LOST TRUST defendants.[1] The Court of Appeals

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[1]In *McCormick v. United States*, 500 U.S. 257, 272 (1991), this Court stressed that care must be taken in applying the Hobbs Act legislators, noting that legislators are involved simultaneously in serving constituents and raising funds for campaigns. It is "unrealistic" to believe that Congress

itself recognized in an earlier opinion that "Cobb was the cornerstone of the prosecution's case and his credibility was the paramount issue at trial." *United States v. Taylor*, 966 F.2d 830, 837 (4th Cir. 1992), *aff'd on reh'g*, 993 F.2d 382 (4th Cir.), *cert. denied*, 510 U.S. 891 (1993). District Court Judge Hawkins was in the best position to determine whether the undisclosed evidence would have changed the result of the trials because it was he who presided over all those trials. His finding that the undisclosed evidence was material should not have been reversed by the Court of Appeals. *See United States v. Zagari*, 111 F.3d 307, 320 (2d Cir. 1997) (where a violation of *Brady* is alleged, "the trial judge's conclusion as to the effect of nondisclosure on the outcome of the trial is entitled to great weight").

3. ***Visit to Smith***: District Judge Hawkins also found that Cobb and Special Agent Clemens committed perjury during a hearing concerning misconduct arising from a visit by Cobb and Clemens to the residence of Steven Smith, a confidante of Senator Lindsay. Cobb and Clemens testified at the hearing that the purpose of their visit was merely to alert Lindsay by telephone that Lindsay's name would come up during Cobb's impending testimony. (A-150, -154.) But Smith later testified in appeal bond proceedings and at a hearing on the motions to dismiss that the purpose of Cobb's and Clemens's visit was to determine whether Cobb should characterize money given to Lindsay as an attorney's fee, and that the United States Attorney had authorized Cobb to so characterize the payoff. (A-148, -149.) Cobb also testified on the motions to dismiss that the United States Attorney had indicated that Cobb could characterize the payment as a legal fee. (A-152, -153.) District Judge Hawkins

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intended that legislators be found guilty of a federal crime when they act for the benefit of constituents or support legislation shortly after soliciting or receiving contributions from persons benefitted by the legislation. "To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation." *Id.* Thus, evidence bearing upon the credibility of Cobb's characterization of the money given the Petitioners was critical and plainly material.

concluded from this testimony, from the circumstances of the visit, and from Cobb's and Clemens's explanation that neither Cobb nor Clemens testified truthfully. (A-150.)

The Court of Appeals' decision that there was no evidence of misconduct by the government (A-57, -58) simply ignores the fact that District Judge Hawkins found that Clemens was not truthful in his initial testimony on the incident. The conclusion on appeal that "there is clearly insufficient evidence from which to infer a purpose for Cobb's telephone call to Lindsay other than that to which Cobb and Clemens initially testified" (A-57) ignores the testimony of both Smith and Cobb in 1995 as well as the overall circumstances.

4. ***Perjury of Greer***: District Judge Hawkins also found that the United States Attorneys involved in the LOST TRUST prosecutions had knowingly allowed Richard Greer, former Chairman of the South Carolina Development Board who cooperated with the government as part of a plea agreement, to commit perjury before the grand jury. Greer testified before a grand jury that he was unaware of any money being paid to state legislators to influence capital gains tax legislation. (A-138, -180.) District Judge Hawkins presided over Greer's subsequent sentencing where, in order to obtain a departure for Greer, the government represented that Greer had been instrumental in identifying which legislators were involved in accepting bribes in connection with the tax law changes, including Lindsay, and that Greer stood ready to testify against those legislators. Based upon the conflict between this representation and the grand jury testimony, District Judge Hawkins found that Greer committed perjury and that the government allowed this perjury to stand. (A-137, -138, -181.)

Reversing this finding, the Court of Appeals chose to accept the "play with semantics" which had been rejected by District Judge Hawkins, holding that Greer did not commit perjury because the question asked him before the grand jury was "[w]ere you aware" of payoffs, not "are you aware" of payoffs; because the question was not asked in the present tense, the Court of Appeals concluded that Greer must have been referring to his knowledge in 1988. (A-67.) The Court of Appeals cited no evidence showing that Greer was referring to his knowledge in 1988; it simply chose to construe the

evidence that way. Again, the appellate court did not review this finding with due deference to the District Court.

The Court of Appeals' decision wholly discounted this perjury and other misconduct in the investigation of bribery with respect to capital gains legislation (A-58, -59) because it failed to appreciate that these investigations were intimately connected. Each stemmed from Cobb's relationship with legislators and dealt with allegations of bribery. Evidence relating to the capital gains investigation showed that Cobb and the government arbitrarily considered certain money transfers to be bribes. District Judge Hawkins was immersed in the facts of these investigations and recognized the significance of the capital gains investigation. (A-134, -135, -181.)

The District Court's findings were certainly supported by evidence of record, and the Court of Appeals' decision does not demonstrate otherwise. The Court of Appeals' decision to reverse the findings reflects simply its decision to interpret the evidence differently and to come to different conclusions. This is not a valid basis for reversing a district court's finding under this Court's controlling precedent. If a district court's finding is plausible, the court of appeals may not reverse it even though convinced that it would have decided the matter differently. *Amadeo*, 486 U.S. at 223. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574.

The District Court's findings are supported by the evidence it heard over the eight years that it presided over the LOST TRUST proceedings. Those findings were carefully explained by the District Court and should have been accepted by the Court of Appeals. The Court of Appeals' decision to reject all the District Court's findings was itself clearly erroneous and should be reversed by this Court.

## II. DISMISSAL OF THE INDICTMENTS WAS A PROPER REMEDY IN RESPONSE TO THE PATTERN OF EGREGIOUS GOVERNMENTAL MISCONDUCT FOUND BY THE DISTRICT COURT.

The Court of Appeals avoided deciding the legal question of whether the pattern of governmental and prosecutorial misconduct found by the District Court justified dismissing the indictments by deciding to reverse the District Court's findings. (A-21.) Because those findings are not clearly erroneous and should be upheld, the question of whether dismissal of the indictments was warranted by the pattern of prosecutorial misconduct identified by the District Court must be addressed.

Although this Court has on occasion found that dismissal of an indictment was an inappropriate response to prosecutorial misconduct in a particular case, it has indicated that a showing of systematic abuses by prosecutors can justify the dismissal of criminal charges. In *United States v. Morrison*, 449 U.S. 361 (1981), this Court ruled that dismissal of an indictment was an inappropriate response to a violation of the defendant's Sixth Amendment rights by government agents because there was no demonstrable prejudice to the defendant. The decision noted, however, that "the record before us does not reveal a pattern of recurring violations by investigative officers that might warrant the imposition of a more extreme remedy in order to deter further lawlessness." *Id.* at 365 n.2.

The situation of recurring government misconduct also was mentioned in *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), where this Court held that it was not appropriate to dismiss an indictment for violations of rules governing grand jury proceedings where it was not shown that the independence of the grand jury was affected by the misconduct. But the decision also noted "that we are not faced with a history of prosecutorial misconduct, spanning several cases, that is so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness of the process which resulted in the indictment." *Id.* at 259. This decision and *Morrison* indicate that a court's supervisory power includes the power to dismiss an

indictment where, as the District Court found in this case, a pattern of prosecutorial misconduct exists.

Indeed, use of the supervisory power where recurring prosecutorial misconduct is found is fully consistent with the purposes for which that power exists. "The purposes underlying the use of the supervisory powers are threefold: to implement a remedy for violations of recognized rights, . . . to preserve judicial integrity by ensuring that a conviction rests upon appropriate considerations before the jury, . . . and finally, as a remedy designed to deter illegal conduct." *United States v. Hasting*, 461 U.S. 499, 505 (1983) (citations omitted). "The power has been applied not only to improve the truth-finding process of the trial, . . . but also to prevent parties from reaping benefit or incurring harm from violations of substantive or procedural rules (imposed by the Constitution or laws) governing matters apart from the trial itself." *United States v. Williams*, 504 U.S. 36, 46 (1992) (citations omitted).

The District Court's decision to dismiss the indictments here was based upon repeated and flagrant violations of the Petitioners' as well as other defendants' established constitutional right to government disclosure of evidence favorable to the Petitioners in accordance with *Brady* and *Giglio*. The District Court also found that prosecutors had violated their obligation under the Fifth Amendment not to knowingly allow perjured testimony to be presented in court, *Napue v. Illinois*, 360 U.S. 264, 269 (1959), and that the prosecutors themselves had made misrepresentations to the Court throughout the proceedings.

Dismissal of the indictments in response to the pattern of misconduct found by the District Court was appropriate in order to deter future misconduct by prosecutors before the District Court and to preserve judicial integrity. The District Court pointed out it had repeatedly admonished the government that it should disclose to the Petitioners and other defendants all the information to which they were entitled under *Brady*, and warned the government that it would take appropriate steps available to the Court if the government was not being candid and forthright. (A-132, -133, -178, -181, -182.) When it turned out that the government had misrepresented facts to the District Court and concealed *Brady* materials, the District Court

determined that the government had committed "fraud on the Court" (A-176), and it was required to take steps commensurate with the misconduct. As the District Court stated:

> There is no way to avoid the conclusion that the various and repeated acts of the government were simply wrong; that the government acted in bad faith, and its misconduct is not only greatly offensive to this court, but has interfered with this court's duty to insure the proper administration of justice.

(A-182.) It is obvious that the District Court's admonitions to the government agents and prosecutors were not sufficient to compel them to comply with their constitutional obligations. Thus, the District Court surely was warranted in dismissing the indictments in order to demonstrate that the kind of misconduct perpetrated by the government in these cases would not be tolerated and to deter similar misconduct from recurring.

Dismissal of the indictments also was appropriate to prevent the government from reaping any benefit from its misconduct. *Williams*, 504 U.S. at 46. In concealing impeaching and exculpatory information from the defendants and allowing false evidence to stand in court, the prosecutors made the calculated decision that the *Brady* material and true facts would not be discovered and that any convictions of the Petitioners would stand. To allow the government a second opportunity to prosecute the defendants after the illegal conduct has been discovered does not punish or redress that misconduct. In fact, the government now has a chance to use the first prosecutions as "dress rehearsals," contrary to established standards of fairness. *See Tibbs v. Florida*, 457 U.S. 31, 41 (1982) (double jeopardy prohibition prevents the government from honing its trial strategies and perfecting its evidence through successive attempts at conviction).

Given the magnitude and frequency of the government misconduct found by the District Court, this case certainly is one where dismissal is appropriate under the supervisory power because of systematic misconduct as contemplated by the decisions in

*Morrison* and *Bank of Nova Scotia*. A demonstrated pattern of misconduct affects the degree to which misconduct is "attenuated" and isolated and so affects the remedy authorized and appropriate under a court's supervisory power. *Hasting*, 461 U.S. at 506. The statement in *Morrison*, 449 U.S. at 365 n.2, that an extreme remedy might be warranted where the evidence reveals a pattern of recurring misconduct in order to deter future lawlessness simply states the obvious: A pattern of illegal conduct indicates an unwillingness on the part of the government to conform to legal norms and a need for a more severe response than mere public approbation. The District Court here found the government's misconduct to be "repetitious, flagrant and longstanding" (A-175), and so was the kind contemplated by this Court in *Morrison*.

While the Court of Appeals placed great reliance on *Hasting* in vacating the dismissal order, *Hasting* is distinguishable because the basis for this Court's ruling that the supervisory power could not be used to reverse a conviction and order a new trial was the concern for the trauma the victims of the crimes would experience in a new trial. *Hasting*, 461 U.S. at 507. This Court ruled that the lower court "failed to strike the balance between disciplining the prosecutor on the one hand, and the interest in the prompt administration of justice and the interests of the victims on the other." *Id.* at 509 (footnote omitted). No similar countervailing interests are involved in the instant case which would make the balance struck by the District Court's order of dismissal improper.

Although the Court of Appeals rejected the authority cited by the District Court as support for dismissing the indictments, it did so in a conclusory manner and without any real consideration of the force of those cases. For example, the Court of Appeals stressed that some of the cases cited by the District Court predated *Hasting* or *Bank of Nova Scotia*. (A-18.) But neither of those decisions eliminated the possibility that a pattern of illegal conduct could be the basis for dismissing an indictment. Indeed, in both *United States v. Omni International Corp.*, 634 F. Supp. 1414, 1436 (D. Md. 1986), and *United States v. Hogan*, 712 F.2d 757, 762 (2d Cir. 1983), the courts specifically cited *Hasting* and stated that *Hasting* did not preclude dismissal of an indictment in response to a pattern of prosecutorial misconduct. Those decisions also held that repeated

instances of misconduct affect the magnitude and seriousness of the offense against the law and justice and so justify a serious form of relief. *Omni International*, 634 F. Supp. at 1438; *Hogan*, 712 F.2d at 761-62.

The Court of Appeals' decision here conflicts with a decision of the Ninth Circuit Court of Appeals in *United States v. Kojayan*, 8 F.3d 1315 (9th Cir. 1993), which held that even a single instance of prosecutorial misconduct can justify dismissing an indictment if that misconduct is serious. In *Kojayan*, the appellate court caught prosecutors in a violation of their duty under *Brady* and in making a false statement to the jury. Reversing the defendants' convictions, the court held that simply ordering a retrial may not afford the defendant sufficient relief because it was important to assure that the misconduct would not be repeated in other cases. *Id.* at 1324. Noting that prosecutors have an overriding obligation to see that justice is served and that the misconduct could not be deemed harmless because it contaminated the trial, the court held that "[i]n a situation like this, the judiciary—*especially the court before which the primary misbehavior took place*—may exercise its supervisory power to make it clear that the misconduct was serious, that the government's unwillingness to own up to it was more serious still and that steps must be taken to avoid a recurrence of this chain of events." *Id.* at 1324-25 (emphasis added). It remanded with instructions for the district court to determine whether dismissal of the indictment with prejudice was appropriate. *Id.* at 1325.

The Court of Appeals' decision in the instant case conflicts with *Kojayan* because the Court of Appeals here refused to recognize any basis for dismissing an indictment under the supervisory power, absent prejudice, regardless of the seriousness of the prosecutorial misconduct. The Court of Appeals' only response to *Kojayan* was to point out that the Ninth Circuit did not cite to either *Hasting* or *Bank of Nova Scotia*. (A-18.) However, the Ninth Circuit did cite to *Williams*, 504 U.S. at 46-47, which was this Court's most recent statement on the criteria for use of the supervisory power at the time *Kojayan* was decided. *Kojayan*, 8 F.3d at 1325. Therefore, *Kojayan* certainly is not distinguishable on the basis that it wholly failed to consider the factors which might justify dismissal of an indictment under the supervisory power.

*Kojayan* correctly recognized, as did the District Court in this case, that serious prosecutorial misconduct warrants dismissing an indictment under the supervisory power.

Indeed, the remedy of dismissal must be available to trial courts in cases like the instant one in order that government prosecutors have some incentive to comply with their obligations under *Brady*. The bulk of the governmental misconduct found by the District Court here involved violations of the disclosure requirements of *Brady*, as well as the knowing use of perjured testimony by the government. (A-178, -180, -181.) The District Court's opinion pointed out that the government repeatedly represented to the Petitioners and the District Court that all the materials requested by the Petitioners or which otherwise had to be disclosed under *Brady* had been disclosed, and the District Court noted at the time of these representations that the Court and the defendants must "take [the prosecutors] at their word." (A-133.) The District Court rightly characterized as most "offensive" "the continual misrepresentations made to the court that all discovery to which the defendants were entitled had been turned over to them," and it stated that the repeated false assertions of full disclosure "rises to the level of outrageous conduct." (A-177, -178.)

Dismissal of the indictments was particularly appropriate in light of these findings because the proper functioning of the *Brady* rule and the right of a defendant to a fair trial, which are the goals of the *Brady* rule, depend largely upon the good faith of the government and the prosecutor. This Court noted as much in *Kyles v. Whitley*, 514 U.S. 419 (1995), stating as follows:

> While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation without more. *But the prosecution, which alone can know what is undisclosed, must be assigned the consequent*

> *responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached.* This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation, . . . the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

*Id.* at 437-38 (emphasis added). This Court went on to point out that "the prosecution cannot be subject to any disclosure requirement without at some point having the responsibility to determine when it must act," and that a prosecutor must act in a manner which "will serve to justify trust in the prosecutor as 'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Id.* at 439 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). *Kyles* recognized that the rules requiring disclosure of evidence by the government are to a large extent dependent upon the integrity of the prosecutor, who alone may have the power of determining whether evidence needed by the defendant comes to light such that a fair trial is afforded the defendant.

It is precisely because the prosecutor alone can determine whether *Brady* material ever is disclosed or, for that matter, whether the existence of perjured testimony is revealed, that a trial court must be able to exercise its supervisory power to dismiss a charge when there is a finding of pervasive and egregious violations of *Brady*. Without the threat of the sanction of dismissal, an unethical prosecutor has little or no incentive to see to it that the duties of disclosure are followed in the first instance and that a defendant obtains a fair trial the first time. Faced with the choice of either disclosing evidence which may impair the chances of obtaining a conviction or concealing that evidence, a prosecutor has little impetus to reveal the evidence if he or she knows that the worst that will happen if the nondisclosure somehow comes to light later is that

the defendant will receive a new trial and that there will be a second chance to convict the defendant.

Allowing the government to make repeated attempts at obtaining a conviction where its own egregious misconduct creates the necessity for a new trial is contrary to constitutional principles:

> "[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

*United States v. Dinitz*, 424 U.S. 600, 606 (1976) (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)). A trial court must have the ability to prevent this kind of harm when it finds that the government has engaged in a pattern of intentionally failing to disclose evidence it was obligated to disclose and allowing false testimony to be presented. Without the threat of this power, a prosecutor may choose to take the chance that evidence unfavorable to the government will not come to light, knowing that there will still be other chances to convict the defendant if the evidence is discovered. The supervisory power must embrace the ability of a trial court to prevent the government from making repeated attempts to convict a defendant where it is the government's own outrageous behavior which deprived the defendant of a fair trial, and the possibility of acquittal, in the first instance.

Even apart from the authority to dismiss an indictment on the basis of a demonstrable pattern of illegal conduct, as indicated in *Morrison* and *Bank of Nova Scotia*, the District Court's decision to dismiss the indictments is supportable because it cannot be said that the Petitioners were not prejudiced or harmed by the government's misconduct. The Court of Appeals stated that "any prejudice that arguably existed as a consequence of discovery violations is fully remedied by this court's orders of new trials." (A-19.) Its apparent reasoning here is that because the Petitioners can

receive a second "fair trial" at which all the evidence hidden from them in the course of the first trials will be available to them and all perjury committed at the first trials will be purged, the Petitioners are not "prejudiced."

While it may be that there is no "prejudice" to the Petitioners in the sense that a second trial will presumably be "fair" and free of the misconduct which affected the first trials, this does not mean that the Petitioners have not been "prejudiced" in the sense that they have been harmed by the governmental misconduct. In this case, the governmental misconduct would have required a reversal of the results of the first trials and would have caused the Petitioners to be tried a second time.[2] A defendant clearly has a "'valued right to have his trial completed by a particular tribunal,'" and should not be required to face repeated governmental attempts to convict him. *Arizona v. Washington*, 434 U.S. 497, 503 (1978) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)). As explained by this Court:

> The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted

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[2] Although the convictions obtained in the first trials were reversed because of improper jury instructions or the improper admission of evidence, and not because of the governmental misconduct, this fact should not absolve the government of the harm caused the Petitioners by its misconduct. Had the exculpatory evidence been disclosed to the Petitioners and had the government not made knowing use of perjured testimony, the Petitioners might have been acquitted. The government, by its intentional misconduct, deprived the Petitioners of a fair trial in the first instance. That the convictions were reversed because of some other trial error should not be a basis for a contention that the Petitioners were not harmed by the misconduct, especially where it is possible that the defendants would have been acquitted absent the misconduct.

> before it is completed. *Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.*

*Arizona*, 434 U.S. at 504-05 (footnotes omitted; emphasis added).

Thus, it is incorrect to say that a defendant is not "prejudiced" when he or she is required to face a second prosecution because of governmental misconduct. A defendant, through no fault of his or her own, is subjected to the emotional and financial costs of a second prosecution and the continuing taint on his or her reputation arising from the mere existence of the criminal charges. While a second trial might be fair and free from prejudice,[3] it ignores reality to say that a defendant is not harmed by the requirement of undergoing a second trial. Where this harm may be attributed to the misbehavior of the government, there must be some meaningful remedy available to rectify that harm.

The instant case involves the kind of harm and prejudice to the Petitioners which makes it wholly distinguishable from the cases relied upon by the Court of Appeals for its determination that the Petitioners were not prejudiced or harmed by the governmental misconduct. In *Hasting*, 461 U.S. at 511, this Court could say on the basis of the overwhelming evidence against the defendants that the misconduct of the prosecutor was harmless and did not affect the jury's guilty verdict. *Hasting* ruled that the supervisory power should not be invoked "when there is no 'reasonable possibility that the [practice] complained of might have contributed to the conviction.'" *Id.* at 506 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963). By contrast, it cannot be said in this case that the defendants would have been convicted had the *Brady* materials

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[3] Indeed, it can be forcefully argued that a defendant's right to a fair trial is unfairly prejudiced when he or she is required to face a second prosecution as a result of governmental misconduct. This Court has recognized the financial burden resulting from a second trial, *id.* at 503, and, to the extent this financial burden inhibits a defendant from either hiring the counsel of his or her choice or obtaining pretrial services helpful to his or her defense, there is the kind of prejudice the government asserts must exist to justify dismissal of an indictment.

withheld by the government been disclosed and the jury allowed to consider those materials. Unlike *Hasting,* the instant case is one where the defendants and the jury were deprived of relevant evidence as a result of prosecutorial misconduct.

The situation involved in *Bank of Nova Scotia* also is distinguishable because, again, it could be said upon examination of the prosecutorial misconduct that it did not affect the independence of the grand jury, especially because much of the prosecutorial misconduct occurred after the grand jury returned the indictment. 487 U.S. at 258. Furthermore, other instances of governmental misconduct in that case involved violations of rules, such as those preserving the secrecy of grand jury proceedings, which serve policies other than assuring that a person is charged and convicted upon sufficient proof of guilt. *Id.* at 259-60. Finally, *Bank of Nova Scotia* involved a case where dismissal was sought on the basis of nonconstitutional and nonfundamental errors, and the standard of prejudice applied in that case was expressly limited to those kinds of errors. *Id.* at 256-57. The instant case involves errors of constitutional dimensions and the violation of rules intended to assure that criminal defendants are convicted in a fair trial where the relevant evidence bearing upon guilt is presented. Unlike *Bank of Nova Scotia,* it cannot be said that the defendants here would not have been acquitted and protected from another prosecution had they not been victims of the prosecutorial misconduct.

The result in *Morrison,* 449 U.S. at 366-67, also is not dispositive here because it was clear in that case that the defendant's trial on the charges was not affected by the violation of her Sixth Amendment right: The government obtained no evidence as a result of the interference with the attorney-client relationship and that relationship had not suffered whatsoever. The case of *United States v. Payner*, 447 U.S. 727 (1980), relied on by the Court of Appeals, also is distinguishable because it involved a defendant's attempt to apply the exclusionary rule based upon a violation of a third-party's Fourth Amendment rights. Thus, not only was the defendant in *Payner* requesting relief where his own rights were not violated, but the relief requested would deprive the jury of relevant evidence in determining guilt or innocence. The instant case involves a situation where the misconduct affected the defendants' personally held

constitutional rights, and the remedy the District Court imposed vindicated the right of the Petitioners, the court, the jury, and the public to have all relevant and competent evidence presented to the jury.

This case is wholly different from any case relied upon by the Court of Appeals in vacating the District Court's order of dismissal. The pattern and nature of the prosecutorial misconduct the District Court found is itself a sufficient basis for dismissal of the indictments in the interest of deterring future misconduct and to assure that the government does not profit from that misconduct. Additionally, this is not a case where it is clear that the defendants suffered no harm or prejudice as a result of the misconduct. They were deprived of their right to a fair trial because of intentional and repeated violations of their constitutional rights by government agents. If the Court of Appeals' decision is allowed to stand, the defendants will be forced to endure another trial on the same charges even though they could well have been acquitted had the government not willfully hid material and exculpatory evidence from them, misrepresented important facts to the court, and allowed perjured testimony to be presented in court. Where such governmental misconduct deprives criminal defendants of the right to a fair trial in the first instance, the remedy of dismissal of the charges should be available in order to deter similar misconduct and to assure that the government abides by its obligation to make relevant exculpatory evidence available to a defendant in the first instance. In light of the repeated and egregious nature of the misconduct found by the District Court, its order dismissing the charges against the defendants should not have been vacated by the Court of Appeals.

## CONCLUSION

Justice Frankfurter, quoting *Nardone v. United States*, 308 U.S. 338, 342 (1939), described the purpose and necessity of the judiciary's supervisory power in *McNabb v. United States*, 318 U.S. 332, 342 (1943), as follows:

> The civilized conduct of criminal trials cannot be confined within mechanical rules. It necessarily demands the authority of limited direction entrusted

> to the judge presiding in federal trials, including a well established range of judicial discretion, subject to appropriate review on appeal, and ruling upon preliminary questions of fact. Such a system as ours must, within the limits here indicated, rely on the learning, good sense, fairness and courage of federal trial judges.

District Court Judge Hawkins, exercising the discretion committed to him and the good sense obtained after presiding over proceedings connected with the OPERATION LOST TRUST prosecutions for eight years, found that the government had engaged in systematic misconduct which warranted the dismissal of the indictments.

The Court of Appeals' disregard of the conclusions reached by the District Court is supported neither by law, the record, nor reason. The District Court's findings were supported by substantial evidence and the Court of Appeals' decision fails to articulate sufficient reasons to label those findings "clearly erroneous." The District Court's decision to dismiss the indictments based upon the pattern of misconduct shown by the evidence also was a proper exercise of its supervisory power in order to deter similar misconduct, remedy the harm inflicted upon the Petitioners and to vindicate the integrity of the Court.

The Petitioners respectfully request that a writ of certiorari issue to the Court of Appeals for the Fourth Circuit in this case and that, after full briefing, this Court reverse the judgment of the Court of Appeals and reinstate the order of the District Court dismissing the indictments.

Respectfully submitted,


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